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No. 92-1617 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1992

CATAWBA TRIBE OF SOUTH CAROLINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's claims against the United States arising out of the Catawba Indian Tribe of South Carolina Division of Assets Act of 1959, 25 U.S.C. 931 *et seq.*, are barred by the six-year statute of limitations of the Tucker Act, 28 U.S.C. 2501.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 982 F.2d 1564. The opinion of the Court of Federal Claims (Pet. App. 21a-38a) is reported at 24 Cl. Ct. 24.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1993. The petition for a writ of certiorari

[1] The Claims Court has recently been renamed the "United States Court of Federal Claims." See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516. We will refer to the trial court in this case by its current name.

was filed on April 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to treaties with Great Britain executed in 1760 and 1763, petitioner relinquished its aboriginal lands in return for a permanent settlement on a 144,000-acre reservation (the 1763 treaty lands). Pet. App. 2a, 22a. This case involves an action brought by petitioner against the United States for money damages stemming from its loss in 1840 of the 1763 treaty lands.

1. Since 1790, federal law has prohibited transfers of interests in any tribal lands except by treaty or convention entered into pursuant to the Constitution, to which the United States must be a party. See 25 U.S.C. 177 (Non-Intercourse Act); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 236-240 (1985). Nonetheless, in 1840 petitioner and the State of South Carolina negotiated a treaty under which petitioner ceded to the State its interest in the 1763 treaty lands in return for the State's promise to purchase petitioner another tract valued at $5,000 and to pay petitioner $16,000 in compensation over a nine-year period. Pet. App. 3a, 22a. In 1842, the State, at a cost of $2,000, bought petitioner a 630-acre parcel, which is the only land petitioner actually occupies today. *Id.* at 22a-23a.

During the 100 years following its 1840 treaty with the State, petitioner communicated with various federal and state officials concerning its claim to the 1763 treaty lands, requesting without success that action be taken on petitioner's behalf to recover the lands. Pet. App. 23a. In 1943, petitioner, South Carolina, and the Secretary of the Interior entered

into an agreement under which the Secretary accepted legal title to 3,434 acres within the area of the 1763 treaty lands, to be held in trust for petitioner. The federal government was also to provide additional services to petitioner, and petitioner adopted a constitution under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, which the Secretary of the Interior approved in 1944. Pet. App. 4a, 23a.

Beginning in 1958, the United States, through the Bureau of Indian Affairs (BIA), began to negotiate with petitioner for an agreement under which the government's trustee relationship with petitioner would be terminated. Pet. App. 4a. Petitioner alleges that in order to secure tribal consent to termination, tribal officials were assured by the BIA that "the Tribe's land claims would not be jeopardized by the Bureau's proposal to terminate federal responsibilities." *Id.* at 53a-54a. With petitioner's cooperation, a draft termination act was prepared and submitted to Congress. *Id.* at 24a. The Catawba Indian Tribe of South Carolina Division of Assets Act of 1959, Pub. L. No. 86-322, 73 Stat. 592, 25 U.S.C. 931-938 (the Catawba Act), was enacted on September 21, 1959. The Act provided that it would not take effect until a majority of the adult members agreed to a method of dividing tribal assets. Following approval by petitioner's members, the termination became effective on July 1, 1962. Pet. App. 5a.

2. In 1976, petitioner requested the Department of the Interior to initiate legal action to secure return of the remaining 1763 treaty lands. That request was denied in 1978 or 1979. Pet. App. 60a. In 1980, petitioner commenced a suit in federal district court against the State of South Carolina and various private landowners, seeking trespass damages and

possession of the 1763 treaty lands. Petitioner contended that the 1840 cession of land to the State was void *ab initio* under the Non-Intercourse Act. Pet. App. 5a-6a, 25a-26a. The district court held that the Catawba Act extinguished any trust relationship between petitioner and the federal government and made the South Carolina statute of limitations on adverse possession applicable to petitioner's land claim. The court of appeals reversed, holding that the Catawba Act did not render the state statute of limitations applicable. *Catawba Indian Tribe* v. *South Carolina*, 718 F.2d 1291 (1983), aff'd on reh'g, 740 F.2d 305 (4th Cir. 1984) (en banc).

This Court granted certiorari. The United States, at the invitation of the Court, filed a brief *amicus curiae* arguing that state law applied to petitioner's claim by virtue of Section 5 of the Catawba Act, 25 U.S.C. 935, which provides that "the laws of the several States shall apply to [petitioner] in the same manner they apply to other persons or citizens within their jurisdiction." This Court agreed, holding that the plain language of Section 5 of the Catawba Act required application of South Carolina's statute of limitations to petitioner's claim. *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510-511 (1986).

On remand, the court of appeals held that adverse possession for ten years after July 1, 1962 (the date the Act took effect) would bar petitioner's claims against individual defendants under South Carolina law. It also held that petitioner would not be barred from recovering possession and damages from those landowners who did not meet the ten-year period of adverse possession. *Catawba Indian Tribe* v. *South*

Carolina, 865 F.2d 1444 (4th Cir.), cert. denied, 491 U.S. 906 (1989).

3. Petitioner then brought this action against the United States in the Court of Federal Claims in 1990, alleging that "[a]s a result of the actions of the United States and the 1986 [Supreme Court] and 1989 [Fourth Circuit] interpretations of the 1959 Act * * * a substantial, though as yet undetermined, portion of [petitioner's] land claim was barred." Pet. App. 61a.[2] The Court of Federal Claims dismissed the complaint on the ground, *inter alia*, that the suit was time-barred because petitioner's claims were not filed within the six-year statute of limitations in 28 U.S.C. 2501 for suits under the Tucker Act. Pet. App. 21a-38a.[3] The Federal Circuit affirmed. Pet. App. 1a-20a.[4]

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[2] Petitioner presented seven claims against the United States, only two of which are at issue in this petition: (1) breach of an alleged "duty to notify the [petitioner] that, as a result of the 1959 Act and contrary to government officials' assurances, the [petitioner] would be required to file its land claim within a period of years or it would be barred," and (2) breach of an alleged implied-in-fact contract to protect the land claim from the effects of the 1959 Act. Pet. App. 64a-68a.

[3] The Court of Federal Claims also found petitioner's claims barred by the five-year statute of limitations under the Indian Claims Commission Act, 25 U.S.C. 70k (1976), which provided an exclusive remedy for claims against the United States first accruing before August 13, 1946. The court reasoned that all of petitioner's claims were grounded on the 1840 treaty and the United States' failure to take any action to recover the land. See Pet. App. 30a-32a. The Federal Circuit held that only two of petitioner's claims were barred by that provision. *Id.* at 9a-11a. That ruling is not at issue here.

[4] Petitioner continues to pursue its remedies against the State of South Carolina and the individuals occupying the treaty lands. To foster settlement of those claims, Congress recently passed a law tolling the statute of limitations for

ARGUMENT

After the Catawba Act became effective on July 1, 1962, petitioner "had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction." *Catawba Indian Tribe*, 476 U.S. at 510. Petitioner failed to do so. See *Catawba Indian Tribe* v. *South Carolina*, 978 F.2d 1334 (4th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1415 (1993). In this suit under the Tucker Act, 28 U.S.C. 1491 and 1505, filed 28 years later, petitioner seeks to shift liability for that failure to the United States. Petitioner's suit, however, is barred by the six-year statute of limitations applicable to claims against the United States.

1. Petitioner's primary contention (Pet. 13-21) is that the Federal Circuit incorrectly applied the law of claim accrual, and that its claims against the United States therefore are not time-barred. In this Court, petitioner styles its claims primarily as ones for "breach of an implied-in-fact contract to protect [petitioner's] claim to possession of [the 1763 treaty lands]," arguing that the negotiations prior to passage of the Catawba Act created a "tacit understanding" between the federal government and petitioner that no limitations would apply to their land claims. Pet. 2-3. Petitioner asserts that that

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petitioner's remaining valid land claims until October 1, 1993. Act of Aug. 11, 1992, Pub. L. No. 102-339, § 3(b), 106 Stat. 870. Moreover, we have been informed that petitioner has recently approved a settlement that, if ratified by the South Carolina legislature and Congress, would dispose of all of petitioner's land claims. Such a settlement would presumably render this case moot.

"contract" was breached in 1985, when the United States filed its brief *amicus curiae* in *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), taking the position, subsequently confirmed by this Court, that the Catawba Act required application of the state statute of limitations to petitioner's land claims against the State and private landowners. Pet. 3. In petitioner's view, its claim here is not that it was injured by the application of state law to its underlying land claims; rather, its injury arose from the government's alleged breach of an agreement to protect those claims. Pet. 14-15. Petitioner's argument is without merit.

a. There is no dispute that petitioner's claim against the United States is one for money damages in an amount greater than $10,000 and that it therefore was properly brought in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. 1491(a)(1) and 1505. The statute of limitations for such claims provides:

> Every claim of which the [Court of Federal Claims] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. 2501. When a waiver of sovereign immunity contains a statute of limitations, the "limitations provision constitutes a condition on the waiver of sovereign immunity," *Block* v. *North Dakota ex rel. Board of Univ. & School Lands*, 461 U.S. 273, 287 (1983), and the statute therefore "define[s] th[e] court's jurisdiction to entertain the suit." *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see also *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). These

principles apply equally to suits by Indians against the United States. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986).

For purposes of Section 2501, a claim accrues when the operative facts are available "entitling the claimant to demand payment and sue here for his money." *Nager Elec. Co.* v. *United States*, 368 F.2d 847, 851 (Ct. Cl. 1966); see also *Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967). In this case, such facts were evident in 1962.[5]

Ever since the Catawba Act took effect in 1962, state law plainly applied to petitioner's underlying land claim. See 25 U.S.C. 935. As this Court explained, "when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims * * * [and] Termination Acts subject members of the terminated tribe to 'the full sweep of state laws and state taxation.'" *Catawba Indian Tribe*, 476 U.S. at 508-509. See also *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Larkin* v. *Paugh*, 276 U.S. 431, 439 (1928); *Dickson* v. *Luck Land Co.*, 242 U.S. 371, 375 (1917). In addition, in many termination acts Congress has expressly left existing claims outside the scope of the legislation. See, *e.g.*, 25 U.S.C. 564t, 677r, 706, 750, and 976. The fact that Congress did not do so in the Catawba Act put petitioner on notice in 1962, 28 years before this suit was filed, that state law applied to its claim.

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[5] After a claim has accrued, the statute of limitations will be tolled only if the facts underlying the claim were either inherently unknowable or fraudulently concealed. *Menominee Tribe* v. *United States*, 726 F.2d 718, 721-722 (Fed. Cir.), cert. denied, 469 U.S. 826 (1984). Such is not the case here.

b. Petitioner's contrary argument is premised solely on its allegation that the government promised in 1960 to "protect [petitioner's] land claim," and then breached that promise in 1985 when it filed a brief *amicus curiae* in the earlier litigation in this Court. Pet. 3, 20. Petitioner concedes, however, that the United States would have satisfied its obligation if it had notified petitioner that the land claim "might * * * be subject to harm as a result of the passage of time." *Ibid.* As this Court held, Congress did so, on behalf of the United States, in 1962, when the Catawba Act made the state statute of limitations applicable to that claim. Any monetary claims against the United States based on breach of a contractual or fiduciary duty to protect the land claim therefore accrued at that time.

In the earlier litigation, this Court held that "the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations [for adverse possession] to [petitioner's] claim." 476 U.S. at 510-511. In other words, it was the Catawba Act itself, not any action of the Executive Branch, that had the effect of "subject[ing petitioner's land claim] to harm as a result of the passage of time." Pet. 3, 20. As the court of appeals correctly explained, judicial resolution of a disputed question of the meaning of an Act of Congress cannot be the event that triggers the accrual of a cause of action:

> While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when [petitioner] *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed

> when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.

Pet. App. 13a; see also, *e.g.*, *Ide* v. *United States*, 25 Ct. Cl. 401, 408 (1890) ("The law had been upon the statute-book since 1802 in substantially the same language * * *. By the decision * * * the Supreme Court did not *make* the law; they only threw judicial light upon what had been the law for more than eighty years, as everybody was bound to know."), aff'd, 150 U.S. 517 (1893).

In petitioner's view, however, the event triggering the running of the statute of limitations was not the enactment of the Catawba Act that rendered state law applicable to petitioner's claims, but the government's expression of its view in this Court many years later that the Catawba Act did just that. Pet. 18 n.8, 20-21. Thus, petitioner argues that the implied-in-fact contract was not breached until 1985, when the United States filed its brief in this Court, and that petitioner did not suffer quantifiable injury until it was clear from this Court's decision that the government's alleged assurances that a limitations period would not apply to petitioner's land claim was incorrect and petitioner would therefore lose some of its land. The brief filed on behalf of the United States did nothing more than restate what the Court found had been expressly done by the Congress of the United States more than 20 years earlier. That reiteration did not commence the running of the limitations period all over again.

Moreover, under petitioner's view, it could have put off its claim against the State and its successors in interest for hundreds of years, virtually ensuring

that its claims to the land would be procedurally barred, and then brought suit against the United States for damages. That application of the statute of limitations would fatally undermine the policy of repose that is served by such statutes. See, *e.g.*, *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985); *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805); cf. *United States* v. *Kubrick*, 444 U.S. 111, 123 (1979). In addition, petitioner was aware that the government did not intend to "act to protect [petitioner's] claim" (Pet. 20) by no later than 1978, when the Department of the Interior denied petitioner's renewed request to bring a lawsuit to recover the 1763 treaty lands. Pet. App. 60a.

c. Petitioner erroneously suggests (Pet. 15-20) that the Federal Circuit's decision conflicts with this Court's decision in *United States* v. *Dickinson*, 331 U.S. 745 (1947). In *Dickinson*, the plaintiff sought compensation for an alleged taking resulting from flooding caused by the United States. The flooding occurred gradually, and the plaintiff waited until inundation was complete before bringing suit. This Court held that when a taking occurs by a continuing process of physical events, the owner need not pursue piecemeal litigation, but may wait until "a final account may be struck." 331 U.S. at 749. There is no such continuing process in this case. To the extent that the United States breached any obligation to petitioner, the injury occurred no later than 1962, when the Catawba Act made state law applicable to petitioner's claim to the treaty lands and removed those lands from all special federal protections. No other governmental action by the United States was necessary to complete any resulting injury.

2. Petitioner also erroneously contends (Pet. 11-13) that this case is necessarily of similar importance to its earlier litigation against South Carolina, in which this Court granted the State's petition for a writ of certiorari. The earlier litigation in this Court involved the Fourth Circuit's interpretation of the Catawba Act in a manner that greatly unsettled the repose and expectations of 27,000 persons who had come to own land within the 1763 treaty area. See *Catawba Indian Tribe*, 476 U.S. at 499. Here, by contrast, the issues raised involve only the application of the settled law of claim accrual to the particular facts of this case, and it is petitioner's legal position, not that adopted by the court of appeals, that would unsettle the repose brought about by the statute of limitations. Consequently, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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